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Federal Abstention and the Demise State Bail Review (Wallace v. Kern)

CASE COMMENTS

FEDERAL ABSTENTION AND THE DEMISE OF STATE BAIL REVIEW

*Wallace v. Kern**

INTRODUCTION

The doctrine of abstention, under which a federal court may refuse to exercise its jurisdiction, is a narrow exception to the duty of the court to decide a controversy properly before it.[1] Abstention is a judicial invention, intended to provide "appropriate deference" to the respective competencies of the state and federal court systems.[2] Case law has confined the circumstances appropriate for abstention to three general categories.[3] In the first instance, abstention is appropriate in cases presenting federal constitutional questions which might be mooted by state court determination of the accompanying state issues.[4] Secondly, abstention is warranted if federal review of a state issue would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.[5] Finally, abstention is required when, absent a showing of immediate irreparable harm, bad faith prosecution, or a patently unconstitutional statute, federal jurisdiction has been invoked to restrain pending state criminal proceedings.[6]

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*520 F.2d 400 (2d Cir. 1975), *cert. denied*, ___ U.S. ___, 96 S.Ct. 1109 (1976).

1. Colorado River Water Conser. Dist. v. United States, ___ U.S. ___, 96 S. Ct. 1236, 1244 (1976); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

2. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964). *See* Colorado River Water Conser. Dist. v. United States, ___ U.S. ___, 96 S.Ct. 1236, 1244 (1976).

3. Colorado River Water Conser. Dist. v. United States, ___ U.S. ___, 96 S. Ct. 1236, 1244 (1976).

4. *Id.*; County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). *See, e.g.*, Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972); United Gas Pipeline Co. v. Ideal Cement , 369 U.S. 134 (1962); R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

5. Colorado River Water Conser. Dist. v. United States, ___ U.S. ___, 96 S. Ct. 1236, 1244-45 (1976). *See, e.g.*, Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593. (1968); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Hawks v. Hamill, 288 U.S. 52 (1933).

6. Colorado River Water Conser. Dist. v. United States, ___ U.S. ___, 96 S. Ct. 1236, 1245-46, 1246 n.22 (1976). *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971); Douglas v. City of Jeanette, 319 U.S. 157 (1943).

The Supreme Court has also used the third abstention category to refrain from enjoining state nuisance proceedings antecedent to a criminal obscenity prosecution, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and collection of state taxes, Great

In *Wallace v. Kern*,[7] a case involving this third abstention category, state criminal bail proceedings were enjoined by a federal district court to protect the bail rights of pretrial detainees.[8] On appeal, the Second Circuit ruled that abstention was the proper course of action and reversed the district court order as an improper intrusion into state criminal procedure. The circuit court held that federal intervention in *Wallace* would preempt available state bail remedies and violate established principles of comity and federalism. However, when viewed in the light of current abstention principles,[9] the facts of *Wallace* are not supportive of the Second Circuit decision. The state bail review procedures in *Wallace* did not afford adequate protection for the due process rights of pretrial detainees. Consequently, injunctive relief by the district court was a proper exception to the federal abstention rule.

FACTS OF THE CASE

Wallace v. Kern was a class action to obtain pretrial bail view and other relief for felony defendants awaiting indictment, trial or sentencing in the Brooklyn House of Detention for Men.[10] The defendants were state court judges and local court personnel[11] who either presided over or administered criminal cases in the Brooklyn area of Kings County, New York. The plaintiffs alleged that the burgeoning criminal caseload of the state courts caused excessive pretrial delays and the consequent confinement of unconvicted detainees for prolonged periods of time which violated their constitutional rights to effective assistance of counsel, speedy trial, and freedom from deprivation of liberty without due process of law. It was further argued that the various court practices stemming from

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Lake Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). *See* Colorado River Water Conser. Dist. v. United States, *supra*.

7. 520 F.2d 400 (2d Cir. 1975), *cert. denied*, ___ U.S. ___ , 96 S. Ct. 1109 (1976).

8. The Supreme Court has implied that the bail provisions of the eighth amendment are applicable to the states as an element of due process. Schilb v. Kuebel, 404 U.S. 357, 365 (1971); Stack v. Boyle, 342 U.S. 1 (1951). The Second Circuit has held that the due process provision of the fourteenth amendment prohibits the states from arbitrarily or unreasonably denying adequate bail to the criminally accused. United States *ex rel.* Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972).

9. *See* Colorado River Water Conser. Dist. v. United States, ___ U.S. ___, 96 S. Ct. 1236 (1976); Gerstein v. Pugh, 420 U.S. 103 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971).

10. Plaintiffs prayed for interlocutory and permanent relief under Section 1 of the Civil Rights Act of 1971, 42 U.S.C. § 1983 (1970), and 23 U.S.C. §§ 2201-02 (1970), to assure bail relief as required by the eighth and fourteenth amendments.

11. Defendants included the six individual justices of the Supreme Court of Kings County, the Clerk of the Criminal Term, and local administrative officials. 520 F.2d at 401.

the overcrowded docket had the effect of intimidating and coercing the detainees into pleading guilty rather than standing trial. Finally, the plaintiffs contended that the incarceration of indigent detainees without adequate pre-detention bail hearings violated the equal protection and due process clauses of the fourteenth amendment.[12]

The issues raised by the detainees were separated for trial into three parts before Judge Orrin G. Judd of the Federal District Court for the Eastern District of New York. *Wallace I*[13] addressed the issue of inadequate assistance of counsel, while *Wallace II*[14]

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12. The specific claims for relief are enumerated in *Wallace v. Kern*, 499 F.2d 1345, 1347 n.2 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975).

13. Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y.), *rev'd per curiam*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) [hereinafter cited as Wallace I].

In *Wallace I*, after exhaustive hearings the district court found that the "overburdened, fragmented system used by Legal Aid [charged with representing indigents in Kings County] [did] not measure up to the constitutionally required level." 392 F. Supp. at 847. Consequently, the district court preliminarily enjoined the defendant Legal Aid Society from accepting more than 40 pending felony cases per attorney at a time, and further ordered the Clerk of the Criminal Term to place on the calendar all pro se motions filed by the inmates of the Brooklyn House of Detention.

Defendants argued that the district court should abstain completely from interference with the Kings County jail system on grounds of comity. In rejecting this contention, the court, citing *Baker v. Carr*, 369 U.S. 186 (1962), stated:

> [W]hile the court remains mindful of the limitations on federal court intrusion in a state's criminal justice system, it bears reiteration that the *crisis situation* in the Kings County Supreme Court, its long existence, and failure of the state and city thus far to provide effective remedies justifies federal court action.

392 F. Supp at 848 (emphasis added). Judge Judd was not about to abstain because of time-worn promises of state remedial action:

> Where there is a present violation of constitutional rights, the *hope of delayed correction* by the state (or the city) should not stay the hand of a federal court. *Watson v. City of Memphis*, 373 U.S. 526, 532-33, 83 S. Ct. 1314, 1318, 10 L. Ed. 2d 529 (1963); *Rozecki v. Caughn*, 459 F.2d 6 (1st Cir. 1972).

392 F. Supp. at 847 (emphasis added).

Although the members of the Second Circuit professed to be "entirely sympathetic with the purposes which the district court judge sought to accomplish by his order," they "felt restrained" to reverse on jurisdictional grounds. 499 F.2d at 622. In a per curiam opinion, the circuit court, citing *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971), found that the Legal Aid Society did not act "under color of state law" within the meaning of 42 U.S.C. § 1983. Furthermore, and without citing any authority, the court found that comity considerations barred the order requiring placing pro se motions on the calendar.

14. Wallace v. Kern, 371 F. Supp. 1384 (E.D.N.Y.), *rev'd*, 499 F.2d 1345 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975) [hereinafter cited as Wallace II].

In *Wallace II*, after a second set of hearings, the district court held that the "notorious and chronic" trial delays of up to nine months in Kings County Supreme

concentrated on the problem of chronic trial delay in the state courts. *Wallace III*,[15] the subject of this commentary, was an attempt to correct the allegedly unconstitutional state bail procedures of Kings County through federal intervention.

The district court in *Wallace III* found the bail procedures of Kings County to be impressive on paper but a shambles in practice. Despite state efforts to clean its own house,[16] the Kings County criminal justice system continued to be plagued by lengthy delays. Those delays, in turn, had a detrimental effect on bail hearings. Initial bail proceedings were either very brief or adjourned altogether, and the determinations made were often based on incomplete or inadequate information.[17] Although there was no limit to

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Court violated plaintiffs' sixth and fourteenth amendment rights to a speedy trial with due process of law. Accordingly, the district court entered a preliminary injunction directing that detainees held for trial for more than six months be tried or released on their own recognizance within forty-five days of their written request for trial. Considering the tremendous number of detainees held in the Brooklyn House of Detention for more than six months, the detrimental effect of such incarceration on the detainees, and want of immediate state remedies to provide speedy trials, the district court again chose not to abstain.

In reversing, the Second Circuit admitted that "lengthy pretrial confinement continue[d] to be the rule in Kings County, despite reform measures instituted by the state courts." 499 F.2d at 1349. However, with a primary focus on the "individual review" criteria of *Barker v. Wingo*, 407 U.S. 514 (1972), the circuit court admonished the lower court for trying to accomplish too much too fast:

> Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis.

499 F.2d at 1351. The Second Circuit did not comment directly on the district court's abstention decision in *Wallace II*.

15. Wallace v. Kern, 520 F.2d 400 (2d Cir. 1975), *cert denied*, ___ U.S. ___, 96 S. Ct. 1109 (1976) [hereinafter cited as Wallace III].

16. Following the district court order of *Wallace I*, the Kings County Supreme Court imposed its own limitations upon the number of cases that could be handled by a Legal Aid Society lawyer at one time. The Society responded in kind with implementation of a new system to provide continuity of representation by a single attorney for each case. Wallace III, *supra* note 15, at 401-02 n.3.

The Kings County Supreme Court implemented a variety of administrative steps, including increasing the number of criminal courts, which lessened trial delay. The information-gathering process on the record of detainees was also improved. Consequently, the first few months of 1974 saw a 30% reduction in the number of defendants awaiting trial for six months or more. However, Judge Judd found that the statistical improvement in the average length of pretrial detention still fell far short of the speedy trial requirement. Wallace II, *supra* note 14, 371 F. Supp. at 1389.

17. The Second Circuit's summary of the district court's finding is illustrative of the inadequacy of the state court's bail determinations:

> Judge Judd found that certain sources of information relative to the bail decision are of great significance, namely, the New York State Criminal

the number of times a detainee could apply for bail review,[18] that possibility proved in reality to be a hollow procedural safeguard. The district court found that even if a detainee were able to push his appeal through channels to the point of review, the judges on appeal merely gave determinative weight to the initial defective bail decision.[19]

Noting that these circumstances clearly deprived plaintiffs of their due process right to adequate bail review,[20] Judge Judd ordered broad improvements in the state court procedure. The court ruled that an evidentiary hearing for bail determination must be held on demand anytime after 72 hours from a detainee's original arraignment and whenever new evidence or changes in facts would justify additional hearings. The court further ordered that the hearings should be of an adversary nature and that the detainees would be entitled to a written statement of the judge's reasons for denying or fixing bail.[21]

Investigation Information Service (NYSIIS) report, an ROR (Release on own Recognizance) sheet. The NYSIIS report contains a listing of all of the defendant's arrests, but is usually incomplete with respect to the disposition of those cases. The ROR sheet contains information on a defendant's background and community ties. While the Pre-Trial Service Agency, an organization funded by the federal and state governments which provides information to the court to assist it in making decisions on bail, endeavors to verify the assertions in the ROR sheet, Judge Judd found that in most cases it is unable to do so prior to the initial bail hearing. . . . The court found that consideration is often given to open charges in the NYSIIS report but denied as to unverified favorable information in the ROR sheet.

Wallace III, *supra* note 15, at 402. Additional testimony as to the insufficiency of initial bail determination was recorded in a footnote to the above text:

The Administrative Judge of the Criminal Court ha[d] directed the judges to put the reasons supporting their bail decisions in writing on the bail papers. The district court found that, although many judges put such reasons on the record, only a few put them on the papers. Moreover, the record of bail proceedings is not transcribed.

Id. at 402 n.5.

18. *Id.* at 407.

19. *Id.* at 402.

20. Relying on *Morrissey v. Brewer*, 408 U.S. 471 (1972), Judge Judd ruled that the bail determination and review procedures of Kings County lacked the evidentiary quality implicit in the due process guarantee of the fourteenth amendment:

[D]ue process requires "that a decision which may result in prolonged confinement shall be based on a full evaluation of the facts, with an opportunity to present or controvert any pertinent evidence, and with a written statement of the reasons why a particular bail determination is reached."

Wallace III, *supra* note 15, at 403 (quoting the district court order).

21. *Id.* The pertinent parts of the district court order read as follows: ORDERED . . . pursuant to 28 U.S.C. § 2201, that a criminal defendant,

On appeal, the Second Circuit did not disturb the district court's findings of fact that the overburdened criminal courts had lost their ability to furnish bail review on demand to indigent detainees. Rather, it ruled that the district court injunction "created an intrusion upon existing criminal process which was fissiparous and gratuitous."[22] Chastising the district court for ignoring the prior abstention rulings of the Second Circuit in previous *Wallace* appeals,[23] the circuit court reversed Judge Judd's order on the

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charged with a felony in Kings County and confined at any institution under the care, custody and control of the defendant Department of Correction be entitled

(a) to a hearing at which the People shall recommend what form of security if any, would secure the defendant's appearance in Court and, only if monetary bail is recommended, the People shall present evidence of the need therefore, and the reasons why alternative conditions of security should not be available; and at which the defendant shall be present and may present evidence cognizable by the court on the factors negating the need for money bail, which hearing shall be had, on written or oral demand, and on five days notice to the People, at any time after 72 hours after arraignment or as new evidence or change in facts may justify thereafter.

(b) the prosecution shall have the burden of proving the need for monetary bail and shall state the reasons why non-financial conditions of release, as well as other financial alternatives prescribed by state statute (CPL Sec. 520.10) will not assure the accused's reappearance at trial.

(c) this evidentiary hearing must be given within five (5) days after a demand is made or at the next scheduled court appearance of the defendant whichever is sooner.

(d) the demand may be made orally in open court or in writing, pro se or by counsel.

(e) if the demand is made in writing it shall specify information sufficient to identify the defendant and shall also set forth the current conditions under which the defendant may be released and in case of alleged new evidence or changes in circumstance, the new circumstances or evidence:

(f) pretrial incarceration of sixty days shall be a change in facts sufficient to justify a *de novo* bail hearing; and it is further

ORDERED . . . that a criminal defendant is entitled to receive a written statement of the reasons for denying or fixing bail including the facts relied on and to have a *de novo* bail hearing upon five (5) days notice to the People, if he/she is held in custody without a written statement of reasons for the instant bail determination.

Id. at 403 n.7.

22. *Id.* at 408.

23. The circuit court was not pleased that its prior *Wallace* opinion had failed to quell the intrusive fervor of the district court:

While the [district court] held that the issue of the effect of delay on the coercion of guilty pleas had to be determined on a case-by-case basis, it

grounds that it was "violative of the principles of comity and federalism as defined by the Supreme Court in *Younger v. Harris.*"[24]

THE CONTEMPORARY ABSTENTION DOCTRINE

Younger v. Harris[25] represents the current federal abstention doctrine barring intervention into pending state criminal proceedings except under the extraordinary circumstances outlined by the Court. According to *Younger*, federal courts may enjoin state criminal proceedings only if the defendants are victims of some bad faith prosecution or an obviously unconstitutional statute, or if the defendants would suffer immediate irreparable injury absent federal assistance. Although some authorities have argued that the *Younger* doctrine will not stand the test of time,[26] a series of recent Supreme Court decisions has upheld and even extended the *Younger* abstention rules.[27] Accordingly, the circuit court in *Wallace III* cannot be faulted for using *Younger* as the authoritative yardstick with which to measure the abstention issue before it. However, a careful analysis of the fact situation in *Wallace III* clearly shows that the circuit court erred in applying the *Younger* doctrine. Without federal relief, the detainees in *Wallace III* were forced to endure an ongoing and irreparable loss of state bail review. As a result the Second Circuit should have treated the *Wallace* situation as an appropriate exception to the general abstention rule of *Younger v. Harris.*

The Abstention Doctrine of YOUNGER V. HARRIS

In *Younger* the Supreme Court set forth a two-element test which it synthesized from its own traditional equity principles.[28]

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apparently considered the evidence developed at the hearing sufficiently compelling, *despite the prior admonitions of this court*, to mandate pretrial evidentiary bail hearings on demand.

Id. at 404 (emphasis added). In this frame of mind the circuit court proceeded to its abstention decision.

24. *Id.* In support of its choice of *Younger v. Harris*, 401 U.S. 37 (1971), as controlling authority on abstention questions, the Second Circuit cited several recent Supreme Court decisions which have applied the *Younger* abstention doctrine. *See* note 27 *infra.*

25. 401 U.S. 37 (1971).

26. *See, e.g.*, Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. REV. 740 (1974).

27. *See, e.g.* Rizzo v. Goode, ___ U.S. ___, 96 S. Ct. 598 (1976) (civil rights action under 42 U.S.C. § 1983 against city police); Helfant v. Kugler, 421 U.S. 117 (1975) (criminal trial for perjury); Schlesinger v. Councilman, 420 U.S. 738 (1975) (army court martial for off-duty sale of marijuana); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (civil trial for obscene nuisance); O'Shea v. Littleton, 414 U.S. 488 (1974) (civil rights action under 42 U.S.C. § 1983 against state judge).

28. *See* Fenner v. Boykin, 271 U.S. 240 (1926); *Ex parte* Young, 209 U.S. 123 (1908).

The test reflects the older common law rule that courts sitting in equity should not act to restrain a criminal prosecution when the moving party has an adequate remedy at law or when the party will not suffer irreparable injury due to denial of equitable relief.[29] These two equity principles were employed by the Court in *Younger* to complement the unique American concepts of comity[30] and federalism.[31] Thus, the *Younger* decision required federal courts generally to abstain from enjoining pending criminal proceedings in state courts.[32] However, the Court went on to say that the federal bench may intervene in certain extraordinary situations. According to *Younger*, injunctive relief is proper under 42 U.S.C. § 1983[33] when

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Early in this century it was expected that *Ex parte Young* would exert an "enormous influence to extend further the exercise of the jurisdiction of the federal courts to grant equitable relief against unconstitutional penalties and prosecutions under state authority." Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 799 n.9 (1934). However, the years since 1908 have seen a variety of legislative and judicial retreats from the rule of *Ex parte Young* and *Fenner v. Boykin*. Those retreats include:

> [T]he three judge court act, 28 U.S.C. § 2281; the Johnson Act of 1934, limiting federal jurisdiction to enjoin state rate orders, 28 U.S.C. § 1342; and the Tax Injunction Act of 1937, limiting federal jurisdiction to enjoin state tax collection, 28 U.S.C. § 1341. On the judicial side, [they] include: the requirement of exhaustion of state "administrative" remedies, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908); the doctrine that the federal court should postpone exercise of its jurisdiction if a state issue may make unnecessary decision of the federal claim, *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); and the doctrine that the federal court should relinquish jurisdiction where necessary to avoid needless conflict with the administration by a state of its own affairs, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public School Commission v. Southern Ry.*, 341 U.S. 341 (1951).

ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371 (commentary) (1969). The retreat from *Ex parte Young* and from *Fenner* has culminated today in the abstention doctrine of *Younger v. Harris*.

29. Younger v. Harris, 401 U.S. 37, 43-44 (1971).

30. *Id.* at 44. "Comity" is often defined with the ambiguous phrase "proper respect for state function." *Id.* To be more concrete, it can be equated with the political-philosophical view that national government will be most efficient if the states and their institutions are left free to perform their separate functions in their separate ways. *Cf.* C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 52 (2d ed. 1970).

31. The *Younger* Court held "federalism" to represent a system of government in which there is a sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states. 401 U.S. at 44.

32. Younger v. Harris, 401 U.S. 37, 43 (1971).

33. To establish a claim under 42 U.S.C. § 1983, the moving party must show that the defending party has deprived him of a right secured by the Constitution or

a state defendant shows that he will suffer "irreparable harm of a great and immediate nature" if the state proceeding is not enjoined.[34] Alternately, the irreparable harm requirement may be satisfied by some bad faith harrassment by the state,[35] or "other situation calling for federal intervention."[36] If the injury suffered by the defendant is only the cost, anxiety and inconvenience incidental to every state criminal proceeding brought lawfully and in good faith, such injury will not be considered irreparable for abstention purposes.[37]

The *Younger* Court determined that a defendant is threatened with irreparable harm whenever it plainly appears that a defense in

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laws of the United States, and that such deprivation was achieved under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

34. Younger v. Harris, 401 U.S. 37, 43-49 (1971). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592, 600 (1975); O'Shea v. Littleton, 414 U.S. 488, 499-504 (1974) (dictum).

35. Younger v. Harris, 401 U.S. 37, 53-54 (1971).

36. The Court briefly observed:

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harrassment. For example . . . we indicated:
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> > It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. 313 U.S. at 402, 85 L. Ed. at 1424.
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> Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be.

401 U.S. at 53-54.

37. Younger v. Harris, 401 U.S. 37, 46 (1971). *See also* Schlesinger v. Councilman, 420 U.S. 738, 754 (1975); Douglas v. City of Jeanette, 319 U.S. 157, 164 (1943).

It is beyond reason that the ordeal of the indigent unlucky enough to be arrested in Kings County constitutes the "cost, anxiety, and inconvenience incidental to every state criminal proceeding brought lawfully and in good faith" that was excluded from the list of irreparable injuries by the *Younger* Court. The district court in *Wallace* found it not uncommon for those unable to make bail to be held in custody for twelve to fifteen months before trial. Wallace II, *supra* note 14, 371 F. Supp. at 1386. The uncontested testimony of experts was that the long and uncertain confinement produced intense mental anxiety and physical deterioration throughout the inmate population, often leading to a despondency that culminated in attempted suicide. *Id.* at 1388. Unable to make bail and return home, the detainees often lost contact with key witnesses for their defense. Whether or not the detainee was ultimately convicted, his long confinement was certain to provoke other personal problems such as loss of a job, strain on family ties, and lack of monetary compensation for time lost when found innocent. *Id.*

state court will not afford adequate protection for the defendant's constitutional rights.[38] If the defendant has an opportunity to vindicate those rights in the state forum, then the state has provided him with an adequate remedy at law and federal intervention will not be ordered.[39] However, if state court procedures are unable to protect the constitutional rights of state criminal defendants, federal intervention to protect those rights is appropriate as an exception to the general federal abstention rule.

Application of the YOUNGER *Rule*

The Second Circuit relied primarily on two Supreme Court cases, *O'Shea v. Littleton*[40] and *Gerstein v. Pugh*,[41] for guidance in applying the *Younger* abstention rules to the facts of *Wallace III*.[42] The Court in *O'Shea* decided that the requested court order would create an unwarranted intrusion into the state court and therefore held that abstention was proper. Abstention was not found proper in *Gerstein*, however, because only a small federal role in the state criminal process was foreseen. The district court order in *Wallace III* falls between these two cases.

In *O'Shea*, citizens of Cairo, Illinois brought a class action against a county magistrate and judge who allegedly engaged in a continuing practice of racial discrimination in bail, sentencing and jury fees. The plaintiffs sought a federal injunction aimed at preventing similar discrimination in future state trials. The district court dismissed for want of jurisdiction. The Seventh Circuit reversed, holding that if plaintiffs proved their allegations, injunctive relief could be considered by the district court.[43]

On appeal, the Supreme Court in *O'Shea* discussed the case's abstention ramifications in dicta only.[44] The Court indicated that the

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38. Younger v. Harris, 401 U.S. 37, 43-49 (1971). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592, 600 (1975); O'Shea v. Littleton, 414 U.S. 488, 499-504 (1974) (dictum).

39. Younger v. Harris, 401 U.S. 37, 45 (1971).

40. 414 U.S. 488 (1974).

41. 420 U.S. 103 (1975). *See* Comment, *Pretrial Detainees Have A Fourth Amendment Right To A Nonadversary, Judicial Determination of Probable Cause*, 10 VAL. U.L. REV. 199 (1975).

42. Wallace III, *supra* note 15, at 404-08.

43. Littleton v. Berbling, 468 F.2d 389, 415 (7th Cir. 1974).

44. The Court dismissed *O'Shea* for lack of standing, concluding that the plaintiffs had failed to present a "case or controversy." 414 U.S. 488, 493-99 (1974). Its discussion of the abstention issue was entirely dicta and therefore of questionable value as strong precedent on the subject. *Cf.* Int'l Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222 (1954); United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1946); Coffman v. Breeze Corp., 323 U.S. 316

strict abstention quidelines of *Younger* were intended to prevent an ongoing federal audit of state criminal proceedings caused by continuous or piecemeal interruption of the state case through relitigation on the merits in the federal courts.[45] "[T]he special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law" would thereby be sustained.[46] The Court also stated that, regardless of the nature of the requested relief, the plaintiffs were not entitled to injunctive relief because they had failed to plead satisfactorily irreparable harm and inadequacy of state remedies.[47] The Court then speculated that the injunction requested by plaintiffs would require the day-to-day supervision of the state court that *Younger* prohibited.[48]

The circuit court in *Wallace* recognized that the relief requested in *Gerstein v. Pugh*[49] did not entail such constant federal supervision of state criminal cases. In *Gerstein*, a class action was instituted in federal district court requesting that persons arrested without warrants and held for detention under Florida law be granted a probable cause hearing. The complainants were arrested in Dade County, Florida under a prosecutor's information, which according to state procedure precluded any right to a preliminary hearing on probable cause for detention. The district court found that the fourth and fourteenth amendments gave complainants the right to a complete judicial hearing on the question of probable cause for pretrial detention, and prescribed detailed procedures for the protection of that right in state courts.[50] The Fifth Circuit affirmed

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(1944). The Second Circuit acknowledged that the *O'Shea* opinion was mostly dicta. Wallace III, *supra* note 15, at 406.

45. O'Shea v. Littleton, 414 U.S. 488, 500 (1974).

46. *Id.*

47. *Id.* at 502.

48. The Court constructed the proposed order as follows:

> An injunction of the type contemplated by [plaintiffs] and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*. Moreover, it would require for its enforcement the continuous supervision by the federal court over the conduct of the [state officials] in the course of future criminal trial proceedings involving any of the members of the [plaintiffs'] broadly defined class.

414 U.S. at 501. The validity of the Court's assumption concerning the contents of the *O'Shea* order is an interesting topic, but beyond the scope of this comment. *See* note 55 *infra*.

49. 420 U.S. 103 (1975).

50. Pugh v. Rainwater, 355 F. Supp. 1286 (S.D. Fla. 1973).

the district court ruling with respect to the complete judicial hearing requirement.[51]

On certiorari from the Fifth Circuit, the Supreme Court decided that intervention was proper in *Gerstein*. Although five members of the Court felt that a complete evidentiary proceeding to determine probable cause was not mandated by the fourth amendment,[52] the Court unanimously held that the prosecutor's decision to file an information was not by itself a constitutionally sufficient determination of probable cause for detention in cases of warrantless arrest.[53] Both the majority and concurring opinions found a total lack of state remedies to provide complainants with a means of obtaining the constitutionally required level of probable cause review.[54] Therefore, federal relief could be granted without violating the abstention rules of *Younger*.

In contrast to the anticipated order of *O'Shea*,[55] the *Gerstein* directive did not interrupt state prosecutions in progress.[56] The

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51. Pugh v. Rainwater, 483 F.2d 778, 788 (5th Cir. 1973).

52. The four concurring justices (Stewart, Douglas, Brennan and Marshall) agreed that the prosecutor's information was not a constitutionally sufficient determination of probable cause for detention, but disagreed with the majority viewpoint that due process does not require a complete hearing in such cases. 420 U.S. at 127. *Cf.* Morrissey v. Brewer, 408 U.S. 471 (1972). *See* Comment, *Pretrial Detainees Have A Fourth Amendment Right To A Nonadversary, Judicial Determination of Probable Cause*, 10 VAL. U.L. REV. 199, 203 (1975).

53. 420 U.S. 103, 114-23 (1975).

54. *Id.* at 126. *See also* Wallace III at 407.

55. In retrospect, it is unclear why the *O'Shea* Court forecast such an extreme order for the district court. It seems plausible that the district court in *O'Shea* could have issued a procedural order that would have been no more intrusive on state affairs than the *Gerstein* order.

56. The Court in *Gerstein* explained the nature of the intrusion created by its order as follows:

> [Plaintiffs'] claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions. *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. *See Conover v. Montemuro*, 477 F.2d 1073, 1082 (3rd Cir. 1972); cf. *Perez v. Ledesma*, 401 U.S. 82, 27 L. Ed. 2d 701, 91 S. Ct. 674 (1971); *Stefanelli v. Minard*, 342 U.S. 117, 96 L. Ed. 138, 72 S. Ct. 118 (1951).

420 U.S. at 108 n.9. *See also* Wallace III, *supra* note 15, at 406-07; Mudd v. Busse 68 F.R.D. 522, 532 (N.D. Ind. 1975). Full implementation of the *Gerstein* order had the practical effect of discouraging challenges to the state system in federal court.

order merely required that a procedure be established whereby the Florida courts would provide a magistrate's hearing for determining probable cause for detention following arrest.[57] Beyond that initial requirement, no federal role in the process was anticipated.[58] In comparison, the *O'Shea* majority assumed that intervention in that case would involve continuous post-order supervision of all future criminal trial proceedings involving members of the plaintiffs' broadly defined class.[59] Any member of the plaintiff class brought to trial would be able to allege discrimination by the judge and demand an immediate federal review of the state court's handling of the merits.[60] The Supreme Court found such ongoing relitigation of state trials to be "in sharp conflict with the principles of equitable restraint which this Court has recognized in *Younger v. Harris.*"[61] Thus, in order to come under the protection of *Younger* and *Gerstein*, the district court order in *Wallace III* would have to afford a much lesser degree of ongoing federal supervision than was present in *O'Shea.*

THE MISAPPLICATION OF ABSTENTION PRINCIPLES IN *Wallace III.*

Guided by the illustrative holdings of *O'Shea* and *Gerstein*, the Second Circuit should have affirmed the district court order in *Wallace III.* The order of the district court in *Wallace III* did not violate the federal rules of abstention, since the bail procedures it required for the state courts did not invite ongoing relitigation of state cases in federal court and since the plaintiffs in *Wallace* had no effective bail remedy at state law.

Extent of Supervision by the District Court

The Second Circuit ruled in *Wallace III* that the district court order created "the kind of continuing surveillance found to be objectionable in *O'Shea.*"[62] However, the relief sought in *Wallace III* was actually analogous to the order in *Gerstein*[63] and fell far short of

57. *See* notes 52-53 *supra* and accompanying text.

58. The only possibility of subsequent federal involvement would be through a federal habeas corpus proceeding.

59. *See* note 48 *supra.*

60. *See* notes 47-48 *supra* and accompanying text.

61. O'Shea v. Littleton, 414 U.S. 488, 502 (1974).

62. Wallace III, *supra* note 15, at 406.

63. The *Wallace III* order was admittedly more detailed than the order in *Gerstein.* Judge Judd specified exactly the bail procedures that are mandated by the Constitution and that the New York courts were to employ in providing bail review, while the Court in *Gerstein* left such determination to state discretion. However, the proven inability of the New York courts to act on their own accord with sufficient success justified Judge Judd's specificity. Also, in the past federal courts have not

the degree of supervision anticipated by the Court in *O'Shea*. The *Wallace III* order, like that of *Gerstein*, created little or no post-decision federal involvement with state proceedings. The court was obligated to review state enforcement of the new bail standards whenever an allegation of noncompliance was raised by a detainee, but the incentive to raise such challenges would weaken as the bail requirements were implemented. The practical consequences of the federal injunction in *Wallace III* would be to reduce the number of bail complaints raised in the federal forum.

The deficiency in the *O'Shea* order was that it did not discourage federal challenges to state procedure. Instead, it would have created unending federal review of state cases, which the Supreme Court labeled an "ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* sought to prevent."[64] The continuing supervision of state courts, which proved to be a fatal defect in *O'Shea*, was not a genuinely foreseeable problem in *Wallace III*. Consequently, the Second Circuit erred in relying upon "continuing supervision" as the cornerstone upon which to build its abstention decision.

Adequate Remedy at State Law

The Second Circuit committed a second error in *Wallace III* by ruling that adequate bail review was available to pretrial detainees in Kings County. Its holding flies in the face of Supreme Court case law and ignores the similarities between *Gerstein* and *Wallace III* on the adequate state remedy issue.

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hesitated to issue injunctive orders of great detail when the circumstances so warranted. For example, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court issued detailed procedures for the conduct of parole violation hearings at the state level. In *Morrissey*, two Iowa convicts whose paroles were revoked by the Iowa Board of Parole filed habeas corpus petitions in federal court alleging that they had been denied due process because their paroles were terminated without a revocation hearing. On appeal to the Supreme Court, the majority found that minimum due process required a complete evidentiary hearing by the Board in all matters of parole revocation. The Court itemized the procedural steps required of the state to insure minimum due process, *id.* at 484-89, in a manner similar to that of Judge Judd's order in *Wallace III*. *See* note 21 *supra*.

In *Morrissey*, the state interest involved was insuring the re-imprisonment of convicts who had violated the requirements of their parole. In comparison, *Wallace III* involved the less compelling interest of insuring the appearance of presumptively innocent men at trial. Logically, if the federal courts have been allowed to intervene with orders of great specificity in the first case, they certainly should be able to do likewise in the latter.

64. 414 U.S. at 500.

The district court in *Wallace III* found that meaningful bail review in Kings County had assumed the *Gerstein* characteristic of "total unavailability."[65] Due to an overburdened legal bureaucracy, the implementation of state statutory bail provisions had collapsed. Initial bail hearings were of a cursory nature, and the decisions made therein were often based on incomplete information.[66] Subsequent bail appeals were decided without a written transcript of the first hearing and with deference to the initial findings of fact.[67] Furthermore, state habeas corpus did not provide a satisfactory alternative to the defective bail appeal procedure. Habeas corpus petitions were reviewed by the same judges who sat in the standard appeal cases, using the same incomplete background information.[68] The aggregate effect of those problems was to paralyze the execution of state bail review laws in the state courts.

Nullification of meaningful bail review through paralysis of the state court system should fall within the Supreme Court's definition of an inadequate state remedy. In *Monroe v. Pape*,[69] the Court ruled that § 1983 was intended to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice to provide relief for persons who had suffered injury to their constitutional rights.[70] The Court declared that "[i]t is no answer that the State has a law which *if enforced* would give relief."[71] The holding in *Monroe* was acknowledged and applied by the Second Circuit prior to its decision in *Wallace III*.[72]

Monroe's definition of inadequate state remedy describes precisely the situation involved in *Wallace III*. The New York bail remedies, though adequate in theory, were unavailable in practice because the courts lacked the time and resources to effectuate them. But in spite of *Monroe*,[73] the Second Circuit refused to give determinative weight to the de facto termination of effective bail review in Kings County. The Second Circuit felt that so long as there was a remedy at law in the form of state habeas corpus, there was not a "total unavailability" of review. In effect, *Wallace III* held

65. *See* Wallace III, *supra* note 15, at 407.

66. *See* note 17 *supra* and accompanying text.

67. *Id.*

68. N.Y. CIV. PRAC. LAW § 7002 (McKinney 1976).

69. 365 U.S. 167 (1961). *See also* McNeese v. Board of Education, 373 U.S. 668, 671-72 (1963).

70. 365 U.S. at 174.

71. *Id.* at 183 (emphasis added).

72. *See* Potwora v. Dillon, 368 F.2d 74, 77 (2d Cir. 1967).

73. The Second Circuit mentioned *Monroe* only once, in a footnote. *See* Wallace III, *supra* note 15, at 407 n.13.

that the availability of relief *on paper* was enough to satisfy the adequate state remedy test of *Younger v. Harris.*[74] Such dependence on statutory form violates the basic equity principles which underscore the *Younger* doctrine. The inadequate state bail review procedures of New York caused irreparable damage to the due process rights of pretrial detainees in Kings County, and federal intervention was the only realistic chance for correction. Federal bail relief should have been granted.

CONCLUSION

The Second Circuit Court of Appeals justified its *Wallace III* decision with the comment: "[The federal courts] are not ombudsmen charged with the responsibility of reforming the state penal system."[75] Its sense of mission certainly conflicts with the judicial responsibilities inherent in many § 1983 civil rights cases. It also rejects the self-image held by other distinguished members of the federal judiciary:

> I [have] always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards[,] securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth.[76]

It is hoped that the holding in *Wallace II* will be a short-lived aberration from the abstention doctrine of *Younger v. Harris.* The federal abstention doctrine will remain vulnerable to similar misuse so long as *Wallace II* is allowed to stand.

74. *Id.* at 407-08.

75. *Id.* at 408.

76. Paul v. Davis, ___ U.S. ___, 96 S. Ct. 1155, 1158 (1976) (Brennan, J., dissenting).